103 FERC ¶ 61,346

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-000
Aquila, Inc.	Docket No. EL03-181-000
City of Glendale, California	Docket No. EL03-182-000
City of Redding, California	Docket No. EL03-183-000
Colorado River Commission	Docket No. EL03-184-000
Constellation Power Source, Inc.	Docket No. EL03-185-000
Coral Power, LLC	Docket No. EL03-186-000
El Paso Merchant Energy, L.P.	Docket No. EL03-187-000
Eugene Water and Electricity Board	Docket No. EL03-188-000
Idaho Power Company	Docket No. EL03-189-000
Koch Energy Trading, Inc.	Docket No. EL03-190-000
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-000
MIECO	Docket No. EL03-192-000
Modesto Irrigation District	Docket No. EL03-193-000
Montana Power Company	Docket No. EL03-194-000
Morgan Stanley Capital Group	Docket No. EL03-195-000
Northern California Power Agency	Docket No. EL03-196-000
PacifiCorp	Docket No. EL03-197-000
PECO	Docket No. EL03-198-000
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-000
Public Service Company of New Mexico	Docket No. EL03-200-000
Sempra Energy Trading Corporation	Docket No. EL03-201-000
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-000
Valley Electric Association, Inc.	Docket No. EL03-203-000 (Consolidated)

ORDER TO SHOW CAUSE CONCERNING
GAMING AND/OR ANOMALOUS MARKET BEHAVIOR
THROUGH THE USE OF PARTNERSHIPS,
ALLIANCES OR OTHER ARRANGEMENTS
AND DIRECTING SUBMISSION OF INFORMATION

(Issued June 25, 2003)

I. Introduction

1. This order finds that, based on a report by Commission Staff (Staff Final Report), and evidence and comments submitted by market participants, there is evidence that Enron Power Marketing, Inc. and Enron Energy Services Inc. (Enron) and a number of entities identified below (collectively, Partnership Entities) worked in concert through partnerships, alliances or other arrangements (jointly, Partnerships) to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the California Independent System Operator Corporation's (ISO) and California Power Exchange's (PX) tariffs during the period January 1, 2000 to June 20, 2001.[1] This order also finds that there is evidence that a number of Partnership Entities, identified below, appear to have had similar Partnerships, which could be attempts to engage in similar activities as the Enron partnerships.[2]

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[1]June 20, 2001 has been selected as the end date of the relevant period in this proceeding, when a prospective mitigation and market monitoring plan took effect; see San Diego Gas & Electric Co., et al., 95 FERC ¶ 61,115 (April 26 2001 Order), order on reh'g, 95 FERC ¶ 61,418 (2001) (June 19 Order) (in the April 26, 2001 Order, the Commission issued a prospective mitigation and market monitoring plan for wholesale sales through the organized real-time markets operated by the ISO; the Commission acted on requests for rehearing and clarification of the April 26 Order on June 19, 2001, modifying and expanding the mitigation plan, effective June 20, 2001). While the mitigation plan was primarily intended to control the real-time energy market, it also had a disciplining effect on congestion costs and eliminated the opportunity to profit from Gaming Practices. The ISO Market Analysis Report for June 2001 shows that the average price of real-time electricity in June decreased 62 percent to $104/MWh from the May average of $275/MWh and total congestion costs for June 2001 were $0.5 million, down from $7 million in May.

[2]The Staff Final Report listed a number of entities that may have had a partnership,
(continued...)

2. Consequently, this order directs those Partnership Entities, in a trial-type evidentiary hearing to be held before an administrative law judge (ALJ), to show cause why their behavior during January 1, 2000 to June 20, 2001 does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs.[3] In addition, we also direct the ALJ to hear evidence and render findings and conclusions quantifying the full extent to which the Partnership Entities may have been unjustly enriched as a result of their conduct, and the ALJ may recommend the monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies. For example, the ALJ may identify non-monetary remedies such as revocation of a Partnership Entity's market-based rate authority and revisions to a Partnership Entity's code of conduct if the ALJ finds such remedies appropriate.

3. This order complements an order being issued concurrently, in which the Commission (1) determines that certain conduct by a number of market participants, during the period January 1, 2000 to June 20, 2001, constituted Gaming Practices that violated the ISO and PX tariffs, (2) directs those who engaged in those Gaming Practices,in a trial-type evidentiary proceeding to be held before an ALJ, to show cause why their behavior during the relevant period does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs, (3) directs the ALJ to hear evidence and render findings and conclusions quantifying the full extent of their conduct, and (4) provides that the ALJ may recommend the monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.[4] Gaming Practices for which the Gaming Practices Show Cause Order institutes a show cause proceeding involve: False Import; Congestion-Related Practices (Cutting Non-firm, Circular Scheduling, Scheduling Counterflows on Out-of-Service Lines, and Load Shift); Ancillary Services-Related Practices (Paper Trading and Double

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[2](...continued)
alliance or other arrangement with Enron. Not all of these entities are addressed in this order. Commission Staff is conducting further analysis to determine if any further action is appropriate for these other entities.

[3]This order also directs the Partnership Entities to (1) inventory all revenues from their partnerships, alliances or other arrangements discussed below and (2) file, as part of their show cause responses, these revenue figures as well as file all related correspondence, e-mail, memoranda, tapes, phone logs, transaction data, billing statements and agreements.

[4]American Electric Power Service Corp., 103 FERC ¶ 61,345 (2003) (Gaming Practices Show Cause Order).

Selling); and Selling Non-Firm Energy as Firm.[5] Whereas the Gaming Practices Show Cause Order concerns allegations that a number of market participants engaged in Gaming Practices, this order addresses allegations that certain market participants engaged in Gaming Practices in concert with other market participants.[6]

4. This order benefits customers by establishing procedures to address activities inconsistent with the ISO and PX tariffs during the period January 1, 2000 to June 20, 2001, consistent with due process.

II. Background

5. By order issued on February 13, 2002, in Docket No. PA02-2-000, the Commission directed a Staff investigation into whether any entity manipulated prices in electricity or natural gas markets in the West or otherwise exercised undue influence over wholesale electricity prices in the West since January 1, 2000.[7]

6. Pursuant to the directive of the February 13, 2002 Order, Staff undertook a comprehensive fact-finding investigation, encompassing both data gathering and data analysis of physical and financial transactions in and out of the California bulk power marketplace and related markets during 2000-2001. Staff's investigation has included a review of a wide variety of factors and behaviors that may have influenced electric and natural gas prices in the West over this period.

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[5]The Commission's analysis regarding what constitutes Gaming Practices is set forth in the Gaming Practices Show Cause Order and incorporated by reference here. See Gaming Practices Show Cause Order, 103 FERC ¶ 61,345 at P 35-67 (Section III-D, Gaming Practices and California Practices).

[6]The potential remedies in this case, as with the potential remedies in the Gaming Practices Show Cause Order (see id. at P 2 & n.3), would apply to the period January 1, 2000 to June 20, 2001 and would be in addition to any refunds owed for the period after October 2, 2000.

[7]Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (February 13, 2002 Order). The February 13, 2002 Order, of course, was not the beginning point of our investigation into the justness and reasonableness of the rates of public utility sellers into the ISO and PX markets. For a general recitation of this procedural history, including the series of events and circumstances giving rise to the California energy crisis, see San Diego Gas & Electric Co., et al., 97 FERC ¶ 61,275 (2001) (December 19, 2001 Order).

7. In August 2002, Staff released its Initial Report on potential manipulation of electric and natural gas prices in these markets, in which it concluded certain conduct was gaming while other practices were legitimate practices.[8] The Initial Report noted that data requests were sent to over 130 sellers of wholesale electricity; entities from all sectors of the industry may have engaged in such trading practices. (Based on the analysis in the Initial Report, the ISO subsequently designed market screens in an effort to review its transaction data and identify potential transactions with characteristics indicative of these trading practices, including the practices that were identified by Staff as legitimate strategies; the ISO's results are discussed below.) Staff expressly noted in this Initial Report, however, that its investigation into certain matters was ongoing and that other areas of inquiry and recommendations not addressed in its Initial Report may be

[8]Initial Report on Company-Specific Separate Proceeding and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000, issued in August 2002.

included in its Final Report.[9] The Staff Final Report on its fact-finding investigation was publicly released on March 26, 2003.[10]

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[9]In the Initial Report, Staff also recommended that the Commission initiate FPA section 206 proceedings against Enron and three of its trading partners. See El Paso Electric Co., et al., 100 FERC ¶ 61,188 (2002) (El Paso Electric); Portland General Electric Co. and Enron Power Marketing, Inc., 100 FERC ¶ 61,186 (2002) (Portland); Avista Corporation, et al.,100 FERC ¶ 61,187 (2002) (Avista Corp.). Those cases are in various stages of progress, with full or partial settlements having been proposed in some.

A settlement agreement between Trial Staff and Avista Corporation was filed on January 30, 2003 in Avista Corp. Comments in opposition to the agreement were filed on February 19, 2003, by the City of Tacoma, Washington and the California Attorney General. On May 15, 2003, Trial Staff amended its study in support of the settlement agreement and requested that the agreement be certified to the Commission. Additional comments were filed by Tacoma and California on May 27, 2003, with reply comments filed by Trial Staff and Avista Corporation. The settlement agreement is awaiting a determination by the Chief Judge on whether it should be certified. Moreover, on April 9, 2003, the Chief Judge issued an order in Avista Corp. in which he determined that the settlement or hearing in that proceeding will cover all issues raised by the Staff Final Report. Avista Corp. and Avista Energy Inc., Order of the Chief Judge Confirming Rulings Made at Prehearing Conference and Establishing Further Procedures, Docket No. EL02-115-000 (issued April 9, 2003). Therefore, this order does not address Avista Corp.

In the El Paso Electric proceeding, on May 28, 2003, the judge certified an uncontested settlement to the Commission with a recommendation that it be accepted. El Paso Electric Company, et al., 103 FERC ¶ 63,036 (2003). Accordingly, this order does not address El Paso Electric.

Further, this order only addresses issues that are not being litigated in the on-going Portland proceeding.

[10]Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 26, 2003) (Staff Final Report). The Staff Final Report is available on the Commission's website at <<http://www.ferc.gov/western>>.

8. Since 1998, the ISO and PX tariffs have contained provisions that identify and prohibit "gaming" and "anomalous market behavior" in the sale of electric power.[11] As explained in more detail below, the ISO tariff, through the ISO's Market Monitoring and Information Protocol (MMIP), defines gaming, in part, as "taking unfair advantage of the rules and procedures set forth in the PX or ISO tariffs, Protocols or Activity Rules . . . to the detriment of the efficiency of, and of consumers in, the ISO Markets."[12] The ISO tariff, through the MMIP, defines anomalous market behavior, in part, as "behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes."[13] The Staff Final Report, among other things, cites to a study by the ISO,[14] in which the ISO identifies activities that purport to fall within the definitions of gaming and/or anomalous market behavior identified in the ISO tariff, and which occurred during the period January 1, 2000 to June 20, 2001.

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[11]See California Independent System Operator Corp., 82 FERC ¶ 61,327 at 62,291 (1998); California Power Exchange Corp., 82 FERC ¶ 61,328 at 62,296 (1998); cf. AES Southland, Inc., et al., 94 FERC ¶ 61,248 at 61,873 & nn. 25-27, order approving stipulation and consent agreement, 95 FERC ¶ 61,167 (2001).

In relevant part, the terms of the two tariffs, the ISO's tariff and the PX's tariff, are substantially identical. Thus, for convenience, we often refer below only to the ISO's tariff.

[12]ISO's MMIP 2.1.3. As explained below, the MMIP is part of the ISO tariff.

[13]MMIP 2.1.1.

[14]See Department of Market Analysis, California ISO, Analysis of Trading and Scheduling Strategies Described in Enron Memos, (October 4, 2002), publicly released on January 6, 2003, available at <<http://www.caiso.com/docs/2003/03/26/2003032613435514289.pdf>> (last viewed June 9, 2003); Addendum to October 4, 2002 Report on Analysis of Trading and Scheduling Strategies Described in Enron Memos: Revised Results for Analysis of Potential Circular Schedules ("Death Star" Scheduling Strategy), (January 17, 2003), available at <<http://www.caiso.com/docs/2003/03/26/2003032613593115924.pdf>> (last viewed June 9, 2003); and Supplemental Analysis of Trading and Scheduling Strategies Described in Enron Memos, (June 2003), available at <<http://www.caiso.com/docs/2003/06/18/2003061806053424839.pdf>> (last viewed June 18, 2003), (collectively, ISO Report). The ISO released its June 2003 Supplemental Analysis after the issuance of the Staff Final Report. The Commission has reviewed the ISO's Supplemental Analysis.

9. In addition, on November 20, 2002, the Commission issued an order that allowed parties in Docket Nos. EL00-95-000, EL00-95-048, EL00-98-000 and EL00-98-042 to conduct additional discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001, and specified procedures for adducing this information.[15] The Discovery Order allowed the parties to conduct discovery, review the material and submit directly to the Commission additional evidence and proposed new and/or modified findings of fact based upon proffered evidence that is either indicative or counter-indicative of market manipulation, no later than February 28, 2003.[16] On February 10, 2003, the Commission issued an order affording parties an opportunity to respond to submissions made by adverse parties.[17] The Rehearing Order allowed parties to file reply comments directly with the Commission by March 17, 2003. The Commission in a later order extended the February 28, 2003 deadline to March 3, 2003, and allowed the reply comments to be filed by March 20, 2003.[18] These filings are referred to as the "100 Days Evidence."

10. On March 5, 2003, the Commission issued a notice providing that the Commission intended to release: (1) all documents submitted in Docket No. PA02-2-000, except documents obtained from other Federal agencies in accord with the Federal Records Act, 44 U.S.C. §3510(b), and (2) all documents submitted in response to the Discovery Order and Rehearing Order.[19] On March 21, 2003, the Commission issued an order directing

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[15]San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al., 101 FERC ¶ 61,186 (2002) (Discovery Order).

[16]Id. at P 27.

[17]San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al., 102 FERC ¶ 61,164 (2003), reh'g pending (Rehearing Order).

On the same day, the Commission expanded the coverage of these responses to include the proceeding in Docket No. EL01-10-007. See Puget Sound Energy, Inc., et al. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement, 102 FERC ¶ 61,163 (2003).

[18]San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al., 102 FERC ¶ 61,194 (2003) (February 24, 2003 Order).

[19]Notice of Intent to Release Information and Opportunity to Comment, 68 Fed.

(continued...)

the release of information no later than March 26, 2003 in accordance with the above notice.[20]

11. Finally, by order issued on April 2, 2003,[21] the Commission provided for the submission of briefs on Commission Staff's interpretation of the MMIP provisions concerning gaming and anomalous market behavior as prohibiting certain practices by market participants. Thirty-three parties filed in response. Their comments are discussed below in the section on the MMIP provisions.

III. Discussion

A. The Commission's Authority in this Case

1. Commission Authority with Respect to the Period Prior to October 2, 2000

12. In our July 25, 2001 order[22] and the November 1, 2000 Order in the California Refund Proceeding, we established a refund effective date (October 2, 2000) concerning the market manipulation allegations at issue in that proceeding, based on the evidence available at that time and the refund limitations set forth in section 206 of the Federal Power Act (FPA).[23] As such, we did not include within the scope of that proceeding, conduct relating to a portion of the period at issue here, i.e., for the period from January 1, 2000 to October 2, 2000. In doing so, however, we noted that the Commission could take action to address earlier periods if, during those earlier periods, a seller did not

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[19](...continued)
Reg. 11,821 (March 12, 2003).

[20]Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, et al., 102 FERC ¶ 61,311 (2003).

[21]Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 103 FERC ¶ 61,016 (2003).

[22]San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al., 96 FERC ¶ 61,120 at 61,506-11 (July 25, 2001 Order), order on clarification and reh'g, 97 FERC ¶ 61,275 (2001).

[23]16 U.S.C. § 824e (2000).

charge the filed rate or violated tariffs.[24] Thus, with respect to the period prior to the October 2, 2000 refund effective date, the Commission can order disgorgement of monies above the post October 2, 2000 refunds ordered in the California Refund Proceeding, if it finds violations of the ISO and PX tariffs and finds that a monetary remedy is appropriate for such violations. Further, while refund protection has been in effect for sales in the ISO and PX short-term energy markets since October 2, 2000, the Commission can additionally order additional disgorgement of unjust profits for tariff violations that occurred after October 2, 2000 (i.e., to June 20, 2001).[25]

2. Commission Authority with Respect to Governmental Entities

13. We note that several of the Partnership Entities are governmental entities, subject to the jurisdictional exemption set forth in section 201(f) of the FPA.[26] In the July 25, 2001 Order, as reiterated in the December 19, 2001 Order, the Commission found that refund liability should apply to energy sold in the ISO and PX short-term energy markets, including that sold by governmental entities. Here, as well, we find that the potential remedies specified in this order, including the disgorgement of unjust profits for the pre-October 2, 2000 period, should apply to sales made by governmental entities as well as to those sales by the other Partnership Entities.

14. In the July 25, 2001 Order, the Commission explained that its jurisdiction attached to "the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants, including [governmental

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[24]96 FERC at 61,507-08, citing Washington Water Power Co., 83 FERC ¶ 61,282 (1998). See also Jack J. Gynsburg v. Rocky Mountain Natural Gas Co., 90 FERC ¶ 61,247 at 61,825-26, reh'g denied, 93 FERC ¶ 61,180 at 61,587 (2000); Public Service Co. of Colorado, 85 FERC ¶ 61,146 at 61,588 (1998).

[25]See December 19, 2001 Order, 97 FERC at 61,239 (the Commission can order equitable remedies, such as disgorgement, for unjust enrichment); accord AES Southland, Inc. and Williams Energy Marketing & Trading Corp., 95 FERC ¶ 61,167 at 61,538 (2001); Transcontinental Gas Pipe Line Corp. v. FERC, 998 F.2d 1313 (5th Cir. 1993).

[26]See 16 U.S.C. § 824(f) (2000).

entities]" and thus that jurisdiction may properly be asserted over sales by governmental entities.[27] The Commission continued:

> Here, the central transactions, wholesale sales of energy in interstate commerce, were governed by FERC-approved rules and a FERC-jurisdictional ISO and PX . . . [and] thus fell within FERC's jurisdiction regardless of the jurisdictional nature of the sellers or buyers. Further, the centralized wholesale spot electricity markets operated by the California ISO and PX were established (and have been modified) subject to FERC review and approval. Because the market did not exist prior to FERC authorization, all those who participated in the market had to recognize the controlling weight of FERC authority. Moreover, it is fair that all those who benefitted from this market also bear responsibility for remedying any potential unlawful transactions that might have occurred in the market.
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> Consequently, if the price for a specific sale is found to be unjust and unreasonable, then all sellers who obtained that price received an unjust and unreasonable rate. To the extent the Commission determines refunds are an appropriate remedy for that sale, consumers can only be made whole by refunds from all sellers who received the excessive price. As [governmental entity] sellers of energy and ancillary services accounted for up to 30 percent of all sales in the California centralized ISO and PX spot markets, excluding them from a potential refund remedy could have a serious detrimental effect on consumers.[28]

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[27] July 25, 2001 Order, 96 FERC at 61,512; accord id. at 61,511-13.

[28] Id. at 61,513 (footnote omitted); accord id. at 61,511-13. On rehearing, the Commission reaffirmed its jurisdiction over these transactions. December 19, 2001 Order, 97 FERC at 62,180-87.

15. This rationale applies equally in the context of violations of MMIP provisions that prohibit gaming and/or anomalous market behavior, as such provisions apply to all transactions in the California market.

B. The MMIP's Provisions Concerning Gaming and/or Anomalous Market Behavior

1. Provisions Cited in the Staff Final Report

16. Concerning the Commission's remedial authority with respect to the Partnership Entities' alleged practices, the Staff Final Report notes that the MMIP is one of several protocols that the Commission required the ISO and PX to include as part of their filed rate schedules.[29] The Staff Final Report also cites the underlying purposes of the MMIP,[30] discussed in MMIP 1.1 (Objectives) which provides in pertinent part:

> This Protocol sets forth the workplan and, where applicable, the rules under which the ISO will monitor the ISO Markets to identify abuses of market power, to ensure to the extent possible the efficient working of the ISO Markets immediately upon commencement of their operation, and to provide for their protection from abuses of market power in both the short term and the long term, and from other abuses that have the potential to undermine their effective functioning or overall efficiency in accordance with Section 16.3 of the ISO Tariff.[31]

17. The Staff Final Report also cites Part 2 of the MMIP which specifies what are termed "Practices Subject to Scrutiny." Among those practices are two that the Staff Final Report identifies as being of particular concern to the Commission; the first is "gaming," and the second is "anomalous market behavior."[32] Gaming is defined at Section 2.1.3 of the ISO's MMIP as follows:

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[29]As further explained below, the MMIP has been part of the ISO's and PX filed tariffs since 1998.

[30]Staff Final Report, ch. VI at 6-7.

[31]MMIP 1.1.

[32]Staff Final Report, ch. VI at 7-10.

> [T]aking unfair advantage of the rules and procedures set forth in the PX or ISO Tariffs, Protocols or Activity Rules, or of transmission constraints in periods in which exist substantial Congestion, to the detriment of the efficiency of, and of consumers in, the ISO Markets. "Gaming" may also include taking undue advantage of other conditions that may affect the availability of transmission and generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state, or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency.[33]

18. Anomalous market behavior is defined at Section 2.1.1 of the ISO's MMIP:

> "Anomalous market behavior" . . . is . . . behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes. Evidence of such behavior may be derived from a number of circumstances, including:
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> > withholding of Generation capacity under circumstances in which it would normally be offered in a competitive market;
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> > unexplained or unusual redeclarations of availability by Generators;
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> > unusual trades or transactions;
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> > pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions, e.g., prices and bids that appear consistently excessive for or otherwise inconsistent with such conditions; and

[33] MMIP 2.1.3.

unusual activity or circumstances relating to imports from or exports to other markets or exchanges.[34]

2. The Staff Final Report's Interpretation of the MMIP[35]

19. In brief, the Staff Final Report interprets the MMIP as "rules of the road" which the Commission may enforce, and as barring the kinds of practices at issue here. The Staff Final Report explains that the MMIP enumerates objectionable practices, the MMIP authorizes the ISO to impose "sanctions and penalties" or to refer matters to the Commission for appropriate sanctions or penalties,[36] and the MMIP was part of the ISO and PX tariffs on file with the Commission during the relevant period.[37] Accordingly, entities that transact through the ISO or PX and engage in such enumerated practices are in violation of filed tariffs. Further, the Staff Final Report concludes that various practices were violations of the MMIP and thus violations of the ISO's and PX's filed tariffs.

3. Comments Regarding the Staff Final Report's Interpretation of the MMIP

a. Supporting Comments

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[34]MMIP 2.1.1.5 further provides that:

> The Market Surveillance Unit shall evaluate, on an ongoing basis, whether the continued or persistent presence of such circumstances indicates the presence of behavior that is designed to or has the potential to distort the operation and efficient functioning of a competitive market, e.g., the strategic withholding and redeclaring of capacity, and whether it indicates the presence and exercise of market power or of other unacceptable practices.

[35]See Staff Final Report, ch. VI at 8-10.

[36]MMIP 7.3.

[37]As the Staff Final Report notes, and as discussed in more detail below, the MMIP has been part of the ISO and PX tariffs on file with the Commission since 1998, which encompasses the relevant period of January 1, 2000 through June 20, 2001.

20. Several commenters supported the Commission Staff's interpretation of the MMIP.[38] They argue that: (1) the MMIP is on file with the Commission as part of a filed tariff, and has been for some time, and thus can be enforced by the Commission; (2) the MMIP applies to all market participants, and is expressly intended to identify abuses and to provide for protection from such abuses; (3) the MMIP provides that the practices that are expressly subject to scrutiny are gaming and anomalous market behavior, and each is defined in some detail; (4) while the MMIP does not expressly prohibit such Gaming Practices as "ricochet" or "get shorty," such a standard would require a level of detail that would be impossible to achieve, and it would require anticipating all of the myriad ways that could be dreamed up to "game" the markets, and to spell them all out in the MMIP; (5) it is hard to conceive that market participants as sophisticated as those here did not realize that the kind of trading practices at issue here were inappropriate; and (6) as part of a filed tariff, the MMIP ultimately is for the Commission to interpret and enforce, and the MMIP itself recognizes that the Commission is the ultimate enforcement authority.

b. Opposing Comments

21. Several parties filed comments opposing Commission Staff's interpretation of the MMIP.[39] They argue that: (1) the MMIP was intended to provide direction to the ISO and not be a standard by which the Commission prosecuted market participants' conduct; (2) the MMIP does not expressly bar any trading practices; and (3) the MMIP does not identify with precision the particular strategies that are subject to scrutiny, and thus, it is too vague to serve as a standard by which to judge market participants' conduct. They argue that the Commission cannot hold market participants responsible in these circumstances, when they have not had fair notice that the trading practices at issue here are prohibited. Further, they contend that there is extrinsic evidence indicating that market participants, particularly including the ISO itself, did not view the MMIP as a bar to the kind of trading practices at issue here or as a basis for ordering disgorgement of unjust profits. In this respect, the parties argue that the Commission to date has never indicated that it viewed the MMIP as a bar to such conduct; its orders, to the extent that they have touched on such matters at all, have, in fact, implied the contrary, according to the opposing commenters. They also suggest that if the Commission initiates an investigation, it would discourage new investment.

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[38] E.g., the California Parties, which include the California Attorney General and the California Public Utilities Commission, among others.

[39] E.g., California Generators; Competitive Supplier Group; Enron; Reliant Resources, Inc.

c. Other Comments

22. The California Parties also argue that other tariff provisions may have been violated, citing the following tariff provisions from the ISO Tariff: (1) Section 5.5.1 (Planned Maintenance); (2) Section 5.5.3 (Forced Outages); (3) Section 5.3 (Identification of Generating Units); (4) Section 5.4 (Western Systems Coordinating Council (WSCC) Requirements); (5) Section 2.2.7.2 (Submitting Balanced Schedules); (6) Section 2.5.22.11 (Failure to Conform to Dispatch Instructions); and (7) Section 20.3 (Confidential Information).

3. Commission Determination

23. In sum, the MMIP puts market participants on notice regarding their rights and obligations in the marketplace. It serves as the "rules of the road" for market participants. It also contemplates that these rules will be enforced by the Market Surveillance Unit, in the form of monitoring and reporting, or by the appropriate body or bodies (including this Commission), in the form of corrective actions.[40] While the Commission's role, in this regard, may be triggered by the referral procedures outlined in the MMIP, the Commission also possesses the authority to enforce a filed tariff even in the absence of a referral.[41] That is, in the Staff Final Report, Staff concludes, and we agree, that one key function of the MMIP is to put market participants on notice as to the rules of the road for market participants, so that the markets operated by the ISO are free from abusive conduct and may function as efficiently and competitively as possible. The Staff Final Report finds, and again we agree, that market participants cannot reasonably argue that they were not on notice that conduct such as the Gaming Practices discussed below would be a violation of the ISO and PX tariffs. In short, the key function of the MMIP is to put market participants on notice of what practices would be subject to monitoring and, potentially, corrective or enforcement action, by either the ISO in the first instance or by the Commission, whose role includes enforcing the terms and conditions of filed rate schedules. Accordingly, it is appropriate for us to institute this proceeding.

24. MMIP 2.3 and its several subparts address how the ISO, including the Market Surveillance Unit, is to respond to market participants engaging in any of the suspect practices delineated in the MMIP. While the MMIP outlines intermediate steps (such as

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[40]Sections 2.3, 3.3.4 and 7.3 of the MMIP outline the procedures to be followed by the ISO and the PX when a market participant is found to have engaged in any of the suspect practices delineated in the MMIP.

[41]16 U.S.C. §§ 824d, 824e, 825h (2000).

arranging for alternative dispute resolution or proposing language changes to the tariff), ultimately, the MMIP directs the Market Surveillance Unit to refer matters to this Commission for enforcement.[42] The MMIP contemplates that, while the ISO may try to correct misconduct on its own, the Commission is to be "the court of last resort" for misconduct committed by market participants, including the gaming and/or anomalous market behavior misconduct defined in the MMIP. While Part 2 of the MMIP enumerates suspect practices, MMIP 7.3 authorizes the ISO to impose "sanctions and penalties" or, as particularly relevant here, to refer matters to the Commission for appropriate sanctions or penalties.

25. We agree with the Staff Final Report that if entities are found to have engaged in the identified misconduct, they will have violated the ISO's and PX's filed tariffs even if such formal procedures as referral outlined in the MMIP did not occur. The Commission can enforce a filed tariff even when there are processes in that tariff which, had they been used, would have assisted the Commission. Ultimately, the Commission can enforce a filed tariff with or without the assistance of a complaint or a referral.[43]

26. In this regard, we note that the ISO and PX each initially submitted its MMIP (along with other protocols), for informational purposes only, on October 31, 1997. The Commission, however, found that the protocols, including the MMIP, "govern a wide range of matters which traditionally and typically appear in agreements that should be filed with and approved by the Commission."[44] The Commission accepted the protocols, including the MMIP, for filing, and directed the ISO and PX each to post the protocols on its Internet site and to file its complete protocols pursuant to section 205 of the FPA within 60 days of the ISO's and PX's Operations Date (that date ultimately was April 1, 1998).[45] Accordingly, the MMIP has been part of the ISO's and PX's filed tariffs since 1998, which includes the period January 1, 2000 to June 20, 2001 at issue here.

27. The Gaming Practices Show Cause Order also addresses the California Parties' argument that there may have been violations of other tariff provisions, besides the MMIP. That order determines that the WSCC requirements cited by the California Parties make no reference to gaming strategies or anomalous market behavior (as does the

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[42]MMIP 3.3.4.

[43]16 U.S.C. §§ 824d, 824e (2000).

[44]Pacific Gas and Electric Co., et al., 81 FERC ¶ 61,320 at 62,471 (1997).

[45]Id. The ISO (in Docket No. EC96-19-029, et al.) and PX (in Docket No. EC96-19-28, et al.) each made that compliance filing on June 1, 1998.

MMIP), and therefore, those provisions do not provide a basis for finding gaming and/or anomalous market behavior. That order also finds that conduct involving arbitrage, underscheduling and confidentiality of certain data either (a) constituted Gaming Practices, but did not warrant remedies, or (b) did not constitute Gaming Practices. Further, that order states that the Commission is currently investigating alleged violations related to physical withholding.

C. Overview of PX and ISO Operations

28. As explained in more detail in the Staff Final Report and the Gaming Practices Show Cause Order, the ISO operates much of the transmission grid in California and is responsible for real-time operations, such as continually balancing generation and load and managing congestion on the transmission system it controls. The PX was created primarily to operate two markets in which energy was traded on an hourly basis. These were the day-ahead and day-of markets. These markets established a single clearing price for each hour across the entire ISO control area, provided there were no transmission constraints. Where transmission congestion existed, a separate clearing price was established for each transmission constrained area or zone in California. Each zonal clearing price was based on adjustment bids submitted by sellers and buyers. The adjustment bids represented the value to an entity of increasing or decreasing (i.e., adjusting) its use of the system. In essence, this is a redispatch of the system to deal with congestion.[46]

29. The ISO operates a variety of markets in order to procure the resources necessary to reliably operate the transmission system, including a day-ahead market and an hour-ahead market for relieving transmission congestion and an energy market to continuously balance the system's energy needs in real time. The latter, real-time market is the final energy market to clear chronologically, after all other markets in the region clear. Bilateral spot markets at trading hubs outside California generally operated in the time period between the close of the PX market and the ISO real-time market.[47]

D. Alleged Partnership Gaming Involving Enron

[46]For a more detailed description of the day-ahead auction process, see the Staff Final Report, ch. VI at 5.

[47]Id. at 5-6.

30. In this section, we discuss evidence indicating that Enron worked in concert with other entities, both inside and outside California, to implement Gaming Practices in ways that manipulated market outcomes. We also discuss evidence that other entities may have had similar agreements with other market participants.

1. Alleged Partnership Gaming[48]

31. Enron created a marketing program based on the use of other entities' assets, thus avoiding large capital expenditures and the risk of owning its own resources, to carry out its various Gaming Practices. Enron focused not only on partnerships and alliances with investor-owned utilities, but also on smaller utilities, such as public utility districts, municipalities, and qualifying facilities.[49] Enron, using these Partnerships with others, gained market share, acquired commercially sensitive data, acquired decisionmaking authority, and promoted reciprocal dealings and equity sharing of profits, among other things, as explained below. Enron formed these Partnerships without filing the agreements with the Commission or notifying the Commission as required under its market-based rate authorizations.[50]

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[48]The Staff Final Report (ch. VI at 37-44) discusses evidence of various practices engaged in by Enron in concert with other market participants. This evidence demonstrates how Enron and the other named market participants appear to have used their partnerships, alliances or other arrangements to engage in various gaming practices. The show cause proceeding ordered herein will address whether Enron and the other named market participants used their partnerships, alliances or other arrangements to engage in the Gaming Practices for which the Commission seeks appropriate remedies in the Gaming Practices Show Cause Order, but here involving such conduct by market participants acting in concert with other market participants.

[49]The other market participants allegedly involved in Partnership Gaming with Enron are: City of Glendale, California (Glendale); City of Redding, California (Redding); Colorado River Commission; Las Vegas Cogeneration, L.P. (Las Vegas Cogeneration); Modesto Irrigation District (Modesto); Montana Power Company (now d/b/a NorthWestern Energy, LLC) (Montana Power); Northern California Power Agency (NCPA); Powerex Corporation (f/k/a British Columbia Power Exchange Corporation) (Powerex); Public Service Company of New Mexico (PSNM); and Valley Electric Association, Inc. (Valley Electric).

[50]See Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,343 (2003) (Enron); see also 16 U.S.C. § 824d (2000); Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993); Enron Energy Services, Inc., 81 FERC ¶ 61,267 at 62,319 (1997).

32. A company's business strategy is devised by top management. In Enron's case, the business model is described in broad-brush terms in Enron documents as "Skilling's 'Enron Network' story." Its promotional literature entitled "Why customers choose Enron," was intended to convince others that using Enron, with its market knowledge of complicated markets such as in California, was a good business decision; using Enron would save these entities labor and systems costs, and importantly, using Enron would be profitable.

33. Under this business model, the nature of Enron's interaction with its business partners developed over time. For example, Enron would first offer "consulting" services that allowed entities to outsource certain tasks rather than manage these tasks themselves. Enron gradually developed these relationships by expanding its services in an attempt to effectively control the assets of others. Enron's compensation for these "services" usually started with a fee structure (e.g., a charge/MWh for scheduling energy with the PX). However, as the original relationship grew into a more comprehensive partnership, alliance or other arrangement, the compensation typically changed to an equity basis (share of profits) when the marketing of wholesale power was involved. An Enron Services Handbook explains that, in most instances, profits from marketing energy were split on a 50/50 basis while profits from capacity sales for ancillary services were split 25/75, with 25 percent going to Enron and 75 percent to its partner.

34. The Staff Final Report cites a presentation at an Energy West Power Business Review Meeting that characterizes this business strategy bluntly, under a section entitled "Gaining Control of Assets." The presentation states:

> Currently pursuing two strategies. The first is gaining control of a variety of small resources or capabilities around the west. For example, the combination of El Paso Electric, Las Vegas Cogen, Valley Electric, and Glendale joint venture provide us with a useful mix of loads and resources in the southwest. These transactions require relatively little capital, but will require automated IT links to customers and more people in the logistics group. [Citation omitted.]

35. Essentially, Enron developed initial business relationships with entities, which over time evolved into partnerships, alliances and other arrangements in which Enron could gain control of decisionmaking in a way that maximized profits for itself and its business partners. The Staff Final Report cites the summary of the Energy West Power Business Review Meeting, which states:

> (1) Currently provide scheduling services to El Paso Electric, Glendale, CFE (Mexico), Tosco, Washington Water Power, and Enron Energy Services.
>
> (2) Use scheduling as a platform that will dovetail with click trade and that will lead to larger transactions that will make more money (e.g., joint venture with the City of Glendale). [Footnote omitted.]

36. In this regard, the Handbook contains a list of California market conditions with instructions for Enron employees concerning whom to call and what steps the partner should follow in order to take advantage of a particular market situation. For example, if prices in the California market are high, the Enron employee would refer to the handbook section entitled "Who do you call and what action to take?" The Enron employee first decides if the price is high enough to be profitable to the "customer." If it is profitable, the Enron employee would: "generate or import and fake, or increase, load." In this situation, the Enron employee could call, for example, Glendale or Valley Electric and instruct them to increase imports into the California ISO control area; the Handbook lists the transmission paths to be used. Or the Enron employee could call, for example, Redding and instruct it to increase generation in northern California to implement this strategy. The pricing structure for this strategy specifies an even 50/50 split of profits between Enron and its partner. In another example, the Handbook alerts the Enron employee to check to see if there are high ancillary service prices. In that situation, the Enron employee should "call Glendale, Puget and El Paso Electric to try to get ancillary services bids in" and "call customers and have them 'bid in' more."

37. The Handbook also includes a list of steps to take if the prices in California are low. In this situation, the instructions call for the opposite strategy: "artificially reduce load and export." The same counterparties are listed with corresponding delivery points for exporting their resources out of California. A similar pricing structure is also listed. Other Enron documents describe arrangements that go beyond joint coordinated activity and describe total Enron control of decisionmaking authority.[51]

38. As its relationship with a customer grew, Enron also collected data from the customer, which it then used for its own trading and marketing activities. For example,

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[51]The Staff Final Report notes that, in an August 22, 2000 West Mid-Market Quarterly Business Review, Enron states that it "touched/managed 3,500 MW/day." Staff Final Report, ch. VI at 41.

its strategy allowed "Enron to know as much or more about the customer's near term position." Finally, under this strategy, Enron planned to:

> Store operational data that the customer's merchant group would not normally be storing. Provide service around analysis and manipulation of data. [Enron North America] would own the data—a potential to lock customers in—if they leave [Enron North America] their data stays here.

39. The Staff Final Report states that the evidence indicates that Enron, on its own, could not have implemented all of its Gaming Practices; it was only with the cooperation of others that these strategies could have been executed. We agree. It appears that Enron used these partnerships and alliances to employ Gaming Practices in violation of the ISO and PX tariffs. At Enron's direction, other entities both inside and outside California made business decisions that capitalized on market conditions in an effort to maximize profits from their assets on a coordinated basis, and changed market outcomes. Market problems and dysfunctions, in short, were considered opportunities.

40. Further, as discussed in an order being issued concurrently with this order, Timothy N. Belden and Jeffrey S. Richter, former Enron executives, signed plea agreements in which they state that they engaged in fraudulent schemes in the California markets in order to obtain increased revenue from wholesale electricity customers and other market participants in California.[52]

41. In sum, it appears that Enron systematically acted in partnership or otherwise in alliance with others, without the Commission's knowledge, to game the market. The collective behavior of these entities turned defects in market rules and market structures into profit-making opportunities for Enron and its partners.

42. Based on the analysis provided in the Staff Final Report and the evidence described in the Staff Final Report, we find that Enron and the other entities with whom it had partnership, alliance or other arrangements like those described above appear to have jointly engaged in market manipulation schemes that had profound adverse impacts on market outcomes, and that violated the ISO and PX tariffs for which the monetary remedy of disgorgement of unjust profits and other appropriate, additional non-monetary

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[52] See Enron, 103 FERC ¶ 61, 343 at P 54 (2003) (citing U.S. v. Timothy N. Belden, (N.D. Cal. Case No. CR02-0313-MJJ); U.S. v. Jeffrey S. Richter, (N.D. Cal. Case No. CR03-0026-MJJ).

remedies may be appropriate. Accordingly, we institute a show cause proceeding with respect to the alleged Partnership Gaming involving Enron, as discussed below.

2. Other Alleged Partnership Gaming

43. The Staff Final Report states that other entities appear to have engaged in promotional activities similar to Enron in an attempt to form strategic alliances. For example, according to the Staff Final Report, Sempra Energy Trading Corporation (Sempra) and PSNM may have competed with Enron in an attempt to perform similar services for El Paso Electric Company. The Staff Final Report further states, and the California Parties argue, that other evidence indicates that various entities appear to have had agreements with other market participants that had similar attributes as the Enron partnership, alliance and other arrangements discussed above (e.g., coordinating activities). These apparent partnerships, alliances or other arrangements are alleged to be between: (1) Sempra and Eugene Water and Electricity Board (EWEB), Coral Power, LLC (Coral), or PSNM; (2) Coral and Glendale; and (3) PSNM and Aquila, Inc. (Aquila), Constellation Power Source, Inc. (Constellation), El Paso Merchant Energy, L.P. (El Paso Merchant), Enron, Idaho Power Company (Idaho Power), Koch Energy Trading, Inc. (Koch), MIECO, Morgan Stanley Capital Group (Morgan Stanley), PECO, PacifiCorp, Poweerex, Sempra or TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. (TransAlta).[53]

44. Based on the analysis provided in the Staff Final Report and the evidence described in the Staff Final Report, we find that these entities, through partnership, alliance or other arrangements like those described above appear to have jointly engaged in market manipulation schemes that had profound adverse impacts on market outcomes, and that violated the ISO and PX tariffs for which the monetary remedy of disgorgement of unjust profits and other appropriate, additional non-monetary remedies may be appropriate. Accordingly, we institute a show cause proceeding with respect to the alleged Partnership Gaming, as discussed below.

E. Show Cause Order and Institution of Trial-Type Evidentiary Proceeding

[53] See Staff Final Report, ch. VI at 44. See also (Exh. No. CA-1) (100 Days Testimony of California Parties' witness Dr. Fox-Penner), citing Exh. No. CA-187, regarding California Parties' allegations of partnership gaming involving PSNM.

45. As described above, we find that the Partnership Entities identified above, through their partnerships, alliances or other arrangements, may have engaged in Gaming Practices as identified in the Gaming Practices Show Cause Order, that violated the ISO's and PX's filed tariffs.

46. Accordingly, we require these entities to show cause, in a trial-type evidentiary proceeding to be held before an ALJ, why they should not be found to have engaged in Gaming Practices in violation of the ISO's and PX's tariffs.[54] They shall submit their show cause responses within 30 days of the date of this order.

47. We also require the Partnership Entities to (1) inventory all revenues from their partnerships, alliances or other arrangements discussed above and (2) file these revenue figures as well as file all related correspondence, e-mail, memoranda, tapes, phone logs, transaction data, billing statements and agreements as part of their show cause responses. This requirement applies to both sides of an agreement regardless of whether the entity is supplying or receiving service. If a Partnership Entity does not provide this information and it is later discovered that such agreements exist, that may be grounds for other possible remedies.

48. In addition, we direct the ALJ to hear evidence and render findings and conclusions quantifying the full extent to which the entities named herein may have been unjustly enriched as a result of their conduct,[55] and the ALJ may recommend the

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[54]We incorporate the Staff Final Report and the underlying record in Docket No. PA02-2-000 by reference into the record in this proceeding.

[55]We will permit the parties to introduce relevant evidence from the 100 Days Evidence proceeding. See San Diego Gas & Electric Co., 101 FERC ¶ 61,186 (2002) (allowing California parties 100 days, concluding February 28, 2003, to conduct discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001).

As discussed in the Staff Final Report and in the body of this order, there is evidence of gaming and/or anomalous market behavior sufficient to require the Partnership Entities to show cause why they should not be found to have employed Gaming Practices in violation of the ISO's and PX's tariffs. As a result, the burden of going forward will be placed on the Partnership Entities. However, the ultimate burden is upon the Commission. To that end, the Commission is aware that many parties in California and elsewhere in the West have sought a forum in which to address the issues

(continued...)

monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies. For example, the ALJ may consider non-monetary remedies such as revocation of a Partnership Entity's market-based rate authority and revisions to a Partnership Entity's code of conduct if the ALJ finds such remedies appropriate.[56]

49. Given the commonality of issues of law and fact presented herein, we consolidate Docket Nos. EL03-180-000, EL03-181-000, EL03-182-000, EL03-183-000, EL03-184-000, EL03-185-000, EL03-186-000, EL03-187-000, EL03-188-000, EL03-189-000, EL03-190-000, EL03-191-000, EL03-192-000, EL03-193-000, EL03-194-000, EL03-195-000, EL03-196-000, EL03-197-000, EL03-198-000, EL03-199-000, EL03-200-000, EL03-201-000, EL03-202-000 and EL03-203-000, for purposes of hearing and decision.

The Commission orders:

(A) The Partnership Entities are hereby directed to submit show cause responses within 30 days of the date of this order, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket Nos. EL03-180-000, EL03-181-000, EL03-182-000, EL03-183-000, EL03-184-000, EL03-185-000, EL03-186-000, EL03-187-000, EL03-188-000, EL03-189-000, EL03-190-000, EL03-191-000, EL03-192-000, EL03-193-000, EL03-194-000, EL03-195-000, EL03-196-000, EL03-197-000, EL03-198-000, EL03-199-000, EL03-200-000, EL03-201-000, EL03-202-000 and EL03-203-000: (1) where the Partnership Entities shall show cause why they should not be found to have jointly engaged in the above-described Gaming Practices in violation of the ISO's and PX's tariffs; and (2) where the appropriate remedies may be identified and quantified, as discussed in the body of this order.

(C) Any interested person desiring to be heard in these proceedings should file a notice of intervention or motion to intervene with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rule 214

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[55](...continued)
raised in this proceeding. Those parties may participate in this proceeding upon requesting and being granted intervenor status.

[56]See supra P 1.

of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214), within 21 days of the date of this order.

(D) An administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days of the filing of the show cause submissions ordered in Ordering Paragraph (A) above, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(E) Docket Nos. EL03-180-000, EL03-181-000, EL03-182-000, EL03-183-000, EL03-184-000, EL03-185-000, EL03-186-000, EL03-187-000, EL03-188-000, EL03-189-000, EL03-190-000, EL03-191-000, EL03-192-000, EL03-193-000, EL03-194-000, EL03-195-000, EL03-196-000, EL03-197-000, EL03-198-000, EL03-199-000, EL03-200-000, EL03-201-000, EL03-202-000 and EL03-203-000 are hereby consolidated for purposes of hearing and decision.

(F) The Secretary is hereby directed to publish a copy of this order in the Federal Register.

By the Commission. Commissioner Massey dissented in part with a separate statement attached

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-000
Aquila, Inc.	Docket No. EL03-181-000
City of Glendale, California	Docket No. EL03-182-000
City of Redding, California	Docket No. EL03-183-000
Colorado River Commission	Docket No. EL03-184-000
Constellation Power Source, Inc.	Docket No. EL03-185-000

Coral Power, LLC	Docket No. EL03-186-000
El Paso Merchant Energy, L.P.	Docket No. EL03-187-000
Eugene Water and Electricity Board	Docket No. EL03-188-000
Idaho Power Company	Docket No. EL03-189-000
Koch Energy Trading, Inc.	Docket No. EL03-190-000
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-000
MIECO	Docket No. EL03-192-000
Modesto Irrigation District	Docket No. EL03-193-000
Montana Power Company	Docket No. EL03-194-000
Morgan Stanley Capital Group	Docket No. EL03-195-000
Northern California Power Agency	Docket No. EL03-196-000
PacifiCorp	Docket No. EL03-197-000
PECO	Docket No. EL03-198-000
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-000
Public Service Company of New Mexico	Docket No. EL03-200-000
Sempra Energy Trading Corporation	Docket No. EL03-201-000
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-000
Valley Electric Association, Inc.	Docket No. EL03-203-000 (Consolidated)

(Issued June 25, 2003)

MASSEY, Commissioner, dissenting in part:

Today the Commission takes another step toward addressing the market manipulation that contributed to the extraordinary Western power crisis. I support this show cause order, and applaud the Commission for dealing with these issues. I write separately to express my disagreement with two aspects of the order.

First, I would not limit the monetary penalty for tariff violations to disgorgement of unjust profits. Market manipulation can raise the single market clearing price paid by all market participants and collected by all sellers. The Federal Power Act requires that all rates and charges be just and reasonable. Where the market has been manipulated so as to affect the market clearing price, that price is not just and reasonable and is therefore unlawful. Simply requiring that bad actors disgorge their individual profits does not make the market whole because all sellers received the unlawful price caused by the manipulation. The narrow remedy of profit disgorgement is not an adequate remedy for the adverse effect of the bad behavior on the market price, and may not be an adequate deterrent to future behavior. The appropriate remedy may be that the manipulating seller

makes the market whole.[57] Unfortunately, today's order appears to take this remedy off of the table. I would prefer to wait to see the extent of harm that specific behaviors caused before addressing the remedy issue.

Second, I would not apply the show cause order to non-public utilities that are otherwise not jurisdictional. Today's order uses the same rationale for doing so as was used to extend a refund obligation to non-public utilities in our July 25, 2001 Order.[58] I disagreed with the rationale at that time, and I still do not believe the Commission has this authority.

For these reasons, I dissent in part from today's order.

William L. Massey
Commissioner

[57]The Commission has accepted the make the market whole remedy as part of a settlement for withholding generation from the California PX market. See 102 FERC ¶ 61,108 (2003).

[58]San Diego Gas & Electric Company et al., 96 FERC ¶ 61,120 (2001).